Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEVEN McMILLAN and PAUL AHMANN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PETITION FOR WRIT OF CERTIORARI

TIMOTHY H. ESSER,
Counsel of Record
NUXOLL, LIBEY, ENSLEY, ESSER & CAMPBELL
520 East Main Street
Pullman, WA 99163
(509) 332-7692
(509) 334-2205 [fax]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The State of Washington seeks to prosecute Petitioners for DUI, driving a vehicle while under the influence of intoxicating liquor, after the State in an earlier, administrative proceeding, imposed probationary license status on each Petitioner after test results obtained at the time of arrest showed each had a breath alcohol level of .10 percent or higher.

Under Washington State's unique statutory scheme, the imposition of probationary license status subjects the licensee to enhanced, mandatory jail should they be convicted in the future of DUI arising from a new incident.

Does the administrative proceeding and imposition of probationary license status constitute punishment as that term is considered under double jeopardy analysis?

Does the *Halper* balancing test, however interpreted, apply to an in personam sanction of this nature?

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PETITION FOR WRIT OF CERTIORARI

Doy McClendon, Gil Crosby, Sally Parrish, Steve McMillan, Frank Sayre, Richard Triquart and Paul Ahmann petition that a writ of certiorari issue to review a decision of the Washington State Supreme Court.

OPINIONS BELOW

The opinion of the Washington State Supreme Court that gives rise to this petition was filed May 1, 1997, and is reprinted in *Appendix A*, page 1-44. The Court's mandate, returning these cases to the Washington State District Court for trial is *Appendix B*, pages 45-46.

The Washington State Supreme Court's decision has been published at 131 Wn.2d 853, ___ P.2d ___. Set forth in *Appendix C*, pages 47-50 are the headnotes from the published decision of the *Washington Reporter.*

JURISDICTION

On May 1, 1997, the Washington State Supreme Court issued its written decision, *Appendix A*. Pursuant to the Court's mandate, *Appendix B*, this decision became final May 21, 1997.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

This case involves the Petitioners' constitutional challenge to Washington State's unique statutory scheme, the 1994 Omnibus Drunk Driving Act, Laws of Washington 1994, Chapter 275. The facts are not in dispute. The trial court's findings of fact and conclusions of law are set out in the majority opinion at *Appendix A*, page 4.

FINDINGS OF FACT

> 1. The Defendant was arrested on suspicion of DUI. He/She agreed to take a breath test which registered .10 or above. Based on these facts, the arresting officer provided to the Washington State Department of Licensing a *Report of Breath/Blood Test*. Pursuant to RCW 46.20.365 the arresting officer issued to the Defendant a temporary license and the Washington State Department of Licensing initiated administrative action which resulted in the imposition of a five year requirement that Defendant drive on a probationary license.
>
> 2. Based on the same facts/incident, the Whitman County Prosecuting Attorney's Office

issued a criminal citation charging the Defendant with the crime of DUI pursuant to RCW 46.61.502.

CONCLUSIONS OF LAW

1. The State of Washington, based upon the same facts, has initiated two separate and distinct proceedings against the Defendant.

2. The criminal proceeding seeks to punish the Defendant.

It is the third conclusion of law entered by the trial court which is at issue here:

3. The civil proceeding brought by the Department of Licensing which seeks imposition of a probationary license also constitutes punishment as that term is considered under double jeopardy analysis pursuant to *State v. Calle*, 125 Wn.2d 769 [888 P.2d 155] (1995).

The majority accurately describes the effect of the probationary license at page 7 of *Appendix A*:

> Under the statutes a person with a probationary license was subject to mandatory minimum penalties which were harsher than those imposed upon a person with a regular driver's license under similar circumstances . . .

And at page 8, Appendix A:

> One of respondents' primary arguments is that a probationary license is punishment under double jeopardy analysis because it subjects its holder to enhanced mandatory minimum penalties in the future if that person subsequently

violates RCW 46.61.502 or 46.62.504 (DUI/Physical Control).

As noted by Justice Talmadge at page 27, fn. 4, *Appendix A*, of his concurring opinion:

> Justice Alexander correctly observes in his concurrence in the dissent, "the probationary license is treated as a prior DUI conviction whether or not the holder of that license is ultimately convicted of the charge which resulted in the issuance of the probationary license."

The same facts which led to the pending DUI charges, the breath alcohol reading in excess of .10, triggered the administrative proceeding and issuance of the probationary license. Should these Petitioners be acquitted of the pending DUI charges they will nevertheless be treated as a second time offender and therefore receive enhanced jail time should they be convicted from a new DUI incident. As explained in footnote 1, page 29 of the dissent in *Appendix A*, they will face seven days mandatory jail rather than one.

> Compare RCW 46.61.5051 (repealed by Laws 1995, ch. 332 §21), Alcohol violator with regular license – penalties *with* RCW 46.61.5052 (repealed by Laws 1995, ch. 332, §21), Alcohol violator with probationary license – penalties. Under the 1994 statutory scheme, a driver with a "regular" nonprobationary license and no DUI convictions within the past five years and whose breath test exceeded .10 but was below .15, faced a mandatory one-day minimum in jail and a ninety-day license suspension. Under similar circumstances, a driver with a probationary license faced a mandatory seven days in jail and

> a one-year license revocation, even if it was a first conviction. The probationary license lasted for a period of five years from the date the probationary status was imposed. RCW 46.20.355(2), RCW 46.61.5051(4) (repealed by Laws 1995, ch. 332 §21). The probationary license status continued whether or not there were DUI charges, much less a DUI conviction.

REASONS TO ALLOW WRIT

The Washington State Supreme Court's interpretation of the double jeopardy analysis set forth in *U.S. v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989), is in conflict with the U.S. Supreme Court decision of *Ball v. United States*, 470 U.S. 856, 84 L.Ed.2d 740, 53 USLW 4395 (1985), and the subsequent review of *Halper* followed by the Tenth Circuit in *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

The splintered nature of the Washington Supreme Court's decision illustrates the continuing confusion in regards to the following quote from *Halper*:

> We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . [I]t follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal

> prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution. *Halper*, 490 U.S. at 448-49.

The Washington Supreme Court majority interprets this paragraph at *Appendix A*, page 17 as follows:

> Under *Halper*, the purposes actually served by the sanction at issue must be assessed in determining whether a civil sanction is "punishment" under double jeopardy analysis. The issuance of probationary licenses is punishment only if it can be characterized as serving *solely* retributive or deterrent purposes. If their issuance may fairly be characterized as remedial and bears a rational relation to the government's remedial purpose, then it is not punishment for double jeopardy purposes. (emphasis in original)

While the decision in *McClendon* was five-four, as noted by the Reporter of Decisions actually only two justices agreed with the majority's *Halper* interpretation set forth above. *Appendix C*, page 48.

The three person concurrence, at page 20 of *Appendix A* written by Justice Talmadge, starts:

> While I agree with the majority opinion, I do not believe we need to rely on the rather unpredictable course of the United States Supreme Court's double jeopardy jurisprudence to reach the conclusion of the majority opinion. The present case rises and falls on a single question: is the license action punishment? If it is punishment, jeopardy attaches.

The concurrence then completely fails to consider *Ball v. United States, supra,* discussed below.

The dissent's (Washington Supreme Court) interpretation of *Halper* at page 34 of *Appendix A,* is:

> *Halper* holds a sanction not "solely remedial" is punishment for double jeopardy purposes. *See* Carlos F. Ramirez, *Administrative License Suspensions, Criminal Prosecution, and the Double Jeopardy Clause,* 23 Fordham Urb. L.J. 923, 927-38 (1996). *Halper,* read as a whole, demonstrates the Supreme Court is faithful to the spirit and meaning of the double jeopardy clause, which prevents double jeopardy punishment even though one or both of those punishments may also be accompanied by other nonpunitive sanctions or goals. But the construction placed on this language by the majority would have the Supreme Court contradicting itself within the same paragraph. Further, the majority's reading contradicts the plan meaning of the *Halper* text by ignoring the words "to the extent," which support the proposition that unless the sanction is "solely to serve a remedial purpose" it is to that "extent" not remedial but punitive.
>
> The majority's claim that one may be subject to multiple punishments without violating the double jeopardy clause provided only there by at least some nonpunitive sanction imposed in addition to the punishment or, in the alternative, that the punishment might also promote a nonpunitive objective, is double-talk.

For support, the dissent at page 38 of *Appendix A* cites the Tenth Circuit Court of Appeals decision, *U.S. v. Hudson,* 14 F.3d 536 (10th Cir. 1994):

> [6][I]f a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial.

U.S. v. URSERY

The concurrence to the majority, footnote 1 at *Appendix A*, page 21, and the concurrence to the dissent both opine that the *Halper* analysis has been modified by the Supreme Court in *U.S. v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996):

> The *Halper* case, however, has been undercut somewhat by the recent case of *United States v. Ursery*. (J. Alexander concurrence to dissent, *Appendix A*, page 42.)

What the court said in *Ursery*, however, at page 2145, was:

> Quite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture . . .

At 2147:

> In sum, nothing in *Halper*, *Kurth Ranch*, or *Austin*, purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.

The critical distinction between a forfeiture proceeding and the civil penalty found to violate double jeopardy in *Halper*, is noted in *Ursery* at page 2150:

> But the forfeiture is not a second in personam punishment for the offense, which is all the Double Jeopardy Clause prohibits.

Ursery is simply not relevant to this case. In this case, the State of Washington obtained an in personam sanction – the imposition of probationary status which is the equivalent of a criminal conviction for future sentencing enhancement. And the state now seeks a conviction for DUI.

BALL V. UNITED STATES

As noted by the trial court in this case, the Whitman County District Court, this result runs afoul of the double jeopardy analysis set forth in *State v. Calle,* 125 Wn.2d 769, 888 P.2d 155 (1995), which in turn explicitly relied upon the U.S. Supreme Court decision in *Ball v. United States,* 470 U.S. 856, 84 L.Ed.2d 740, 53 USLW 4395 (1985). In *Ball,* the defendant was convicted of both receipt of a firearm by a convicted felon and possession of a firearm by a convicted felon, arising out of the same facts. The court held that a concurrent as opposed to a consecutive sentence did not alleviate the double jeopardy violation stating at page 864:

> One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense. See *Missouri v. Hunter,* 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983).
>
> The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the

> concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole **or result in an increased sentence under a recidivist statute for a future offense.** (emphasis mine)

We respectfully suggest that the balancing test discussed in *Halper*, whether one accepts the majority or dissent's interpretation thereof, is simply inapplicable when the in personam sanction imposed by the State is the deterrent threat of enhanced incarceration.

CONCLUSION

Today in the United States we are faced with the incipient growth of a fourth branch of government – the administrative agency. When the State authorizes its administrative agency to conduct a judicial hearing, the result of which is to impose upon the defendant the equivalent of a criminal conviction, said action not only constitutes a punishment, but should be considered a criminal prosecution for double jeopardy purposes. Thus, the subsequent prosecution for DUI arising out of the same facts should be considered a violation of one's Fifth Amendment double jeopardy rights. This Petition should

be granted to clarify the double jeopardy implications of civil sanctions which are in personam in nature and punitive.

Respectfully submitted,

NUXOLL, LIBEY, ENSLEY, ESSER
& CAMPBELL

TIMOTHY ESSER
Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE of WASHINGTON, Petitioner, v. DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEPHEN STARK BRIAN HAYTON AND MARK BOOTH, Respondents	)	Number 63066-6. En Banc Filed MAY - 1 1997

SMITH, J. – The parties and a judge of the Whitman County Superior Court jointly seek review of a Whitman County District Court decision granting the respondents' motion to dismiss charges of driving while under the influence of intoxicating liquor in violation of RCW 46.61.502. We granted review. We reverse and remand for trial.

QUESTION PRESENTED

The sole question presented in this case is whether it is unconstitutional double jeopardy for the State of Washington to prosecute respondents for violation of RCW 46.61.502, driving a vehicle while under the influence of intoxicating liquor, when the Department of Licensing has previously issued each respondent a probationary license after test results showed each had a breath alcohol level of .10 percent or higher.

STATEMENT OF FACTS

The cases against all eight respondents were dismissed by the Whitman County District Court, the Honorable David Frazier, on May 1, 1995. On May 9, 1995 the State of Washington appealed the cases to the Whitman County Superior Court. The judge, the Honorable Wallis W. Friel, and all parties asked this court for direct review. We granted review of the consolidated cases on October 5, 1995.

The eight respondents were initially charged in the Whitman County District Court by the Whitman County Prosecuting Attorney for violations of RCW 46.61.502, driving while under the influence of intoxicating liquor. In connection with the State's appeal, the parties on June 26, 1995 filed in the Whitman County Superior Court an "Agreed Narrative Report of Proceedings" dated June 16, 1995, which states:

> [Respondents] Doy L. McClendon, Gil Crosby, Sally Parrish, Frank Sayre, Richard Triquart, Stephen Stark, Brian Hayton and Mark Booth [were] arrested for suspicion of violating RCW 46.61.502 on 12/9/94, 11/19/94, 12/2/94, 1/31/95, 12/18/94, 2/3/95, 2/9/95 and 3/5/95 [respectively]. Each defendant submitted to a BAC Datamaster Verifier test in compliance with RCW 46.20.308 and all relevant Washington Administrative Code provisions. Each defendant registered a breath test result of .10 or higher. All defendants [were] issued temporary licenses and advised of their right to an administrative hearing pursuant to [RCW] 46.20.365. And, all defendants were issued probationary

licenses as a result of their performances on the breath test.

Subsequent to the issuance of the probationary licenses the Whitman County Prosecutor's office initiated criminal actions in the Whitman County District Court for alleged violations of RCW 46.61.502 [based on] the same conduct. On February 16, 1995, Defense's Motion to Dismiss for Violation of Double Jeopardy was filed. On February 21, 1995, the State's response was filed. Argument on this issue was heard by Judge [David] Frazier on March 3 and March 8, 1995. Judge Frazier reserved ruling on the matter. On April 17, 1995, Judge Frazier ruled in favor of the State finding that subjecting a defendant to a civil proceeding which seeks imposition of a probationary driver's license did not constitute punishment. On April 18, 1995, defense counsel filed Defendant's Motion for Reconsideration. On April 27, 1995, Judge Frazier reversed his decision of April 17, 1995, ruling in favor of the defense and citing *State v. Calle*, 125 Wn.2d 769 [888 P.2d 155] (1995), but reserved ruling on the appropriate remedy. On May 1, 1995, over the objections of the State, on the ground of lack of notice, the above-entitled cases [were] consolidated and Findings of Fact and Conclusions of Law were entered granting the defense Motions to dismiss. On May 9, 1995, the State [Appellant] filed a timely Notice of Appeal.

The Findings of Fact and Conclusions of Law entered by the District Court on May 1, 1995 stated:

FINDINGS OF FACT

1. The Defendant was arrested on suspicion of DUI. He/She agreed to take a breath test which registered .10 or above. Based on these facts, the arresting officer provided to the Washington State Department of Licensing a *Report of Breath/Blood Test*. Pursuant to RCW 46.20.365 the arresting officer issued to the Defendant a temporary license and the Washington State Department of Licensing initiated administrative action which resulted in the imposition of a five year requirement that Defendant drive on a probationary license.

2. Based on the same facts/incident, the Whitman County Prosecuting Attorney's Office issued a criminal citation charging the Defendant with the crime of DUI pursuant to RCW 46.61.502.

BASED ON THESE FINDINGS, the court concludes:

CONCLUSIONS OF LAW

1. The State of Washington, based upon the same facts, has initiated two separate and distinct proceedings against the Defendant.

2. The criminal proceeding seeks to punish the Defendant.

3. The civil proceeding brought by the Department of Licensing which seeks imposition of a probationary license also constitutes punishment as that term is considered under double jeopardy analysis pursuant to *State v. Calle*, 125 Wn.2d 769 [888 P.2d 155] (1995).

THEREFORE, IT IS HEREBY ORDERED:

1. That the criminal charge of DUI filed herein is dismissed with prejudice.

2. Costs are not awarded, but shall abide the outcome of any appeal.

On July 28, 1995, Appellant, Respondents, and the Honorable Wallis W. Friel, Whitman County Superior Court, filed a joint request for direct review by the Supreme Court. We granted review on October 5, 1995. Amicus Curiae, Washington Association of Prosecuting Attorneys, filed a brief in support of Appellant State of Washington on October 26, 1995.

DISCUSSION

Waiver of Rules

Rule for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 1.1(a) provides for review by the superior court of certain decisions of courts of limited jurisdiction, including final decisions of district courts.[1] There is no court rule or statute providing for certifying or transferring RALJ appeals from the superior court to the Supreme Court.

This Court's authority to make rules carries with it the inherent power to waive rules when justice requires

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[1] RALJ 1.1(a) provides in pertinent part:

"**(a) Proceedings Subject to Rules.** These rules establish the procedure, called appeal, for review by the superior court of a final decision of a court of limited jurisdiction, subject to the restrictions defined in this rule. These rules apply . . . to review of (1) district courts. . . . "

it.[2] We have previously waived rules to promptly resolve issues relating to enforcement of laws governing driving while under the influence of intoxicating liquor or drugs.[3] Whether the double jeopardy clause prohibits the state from prosecuting respondents for driving under the influence of intoxicating liquor after the Department of Licensing issues them probationary licenses is a significant question which deserves prompt resolution and merits waiver of the rules for review by this Court. We therefore waive the rule and accept these cases for direct review.

Probationary Licenses and 1995 Legislative Changes

Because the Legislature in 1995 repealed or amended statutes relating to probationary licenses after these appeals were filed, we must first determine whether those changes affect this case.[4]

The Legislature created the new category of "probationary license" in the "1994 Omnibus Drunk Driving Act" (Act), which took effect July 1, 1994.[5] Under the Act the Department of Licensing (Department) issued probationary licenses to persons under certain circumstances,

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[2] *O'Connor v. Matzdorff*, 76 Wn.2d 589, 596-97, 458 P.2d 154 (1969).

[3] *City of Seattle v. Williams*, 128 Wn.2d 341, 908 P.2d 359 (1995).

[4] *See* Laws of 1995, ch. 332; Laws of 1995, 1st Sp. Sess., ch. 17.

[5] Laws of 1994, ch. 275.

including those violating RCW 46.61.502[6] or RCW 46.61.504[7] who take a test showing a blood alcohol concentration of .10 or higher. Respondents were issued probationary licenses under those statutes.[8]

Under the 1994 Act, former RCW 46.61.5051 provided penalties for a person with a regular driver's license who was convicted under RCW 46.61.502 and RCW 46.61.504. Former RCW 46.61.5052 outlined penalties for a person with a probationary license who was convicted of violating those statutes. Under the statutes a person with a probationary license was subject to mandatory minimum penalties which were harsher than those imposed upon a person with a regular driver's license under similar circumstances. For example, a person with a probationary license who violated RCW 46.61.502(1)(a) or RCW 46.61.504(1)(a) because of a blood alcohol level of at least

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[6] Under RCW 46.61.502 it is a gross misdemeanor for a person to (1) drive and have a blood alcohol concentration of 0.10 within two hours after driving, as shown by tests; or (2) drive while under the influence of or affected by intoxicating liquor *or* drugs; or (3) drive while under the influence of or affected by intoxicating liquor *and* drugs.

[7] Under RCW 46.61.504 a person commits a gross misdemeanor for being in actual physical control of a motor vehicle and (1) under the influence of intoxicating liquor or drugs within two hours after being in physical control of the vehicle; or (2) while under the influence of or affected by intoxicating liquor *or* drugs; or (3) while under the influence of or affected by intoxicating liquor *and* drugs.

[8] RCW 46.20.365(3)(a) (repealed 1995). This section, referring to RCW 46.61.502 and RCW 46.61.504, provided that probationary licenses were issued to persons arrested in such circumstances only if it was the first such incident within five years.

.10, but less than .15, was subject to imprisonment of at least seven days, but not more than a year; a fine of at least $500.00, but not more than $5,000.00; and suspension of that person's driver's license or permit for one year.[9] By comparison, a person holding a regular driver's license under similar circumstances, who had not been convicted of violating RCW 46.61.502 or RCW 46.61.504 within five years prior to the current violation, was subject to imprisonment for at least one day, but not more than a year; a fine of at least $350.00, but not more than $5,000.00; and suspension of that person's driver's license or permit for 90 days.[10]

The Legislature in 1995 repealed former RCW 46.61.5051 and former RCW 46.61.5052, effective September 1, 1995.[11] It then enacted RCW 46.61.5055, which outlines penalties for *all* persons convicted of violating RCW 46.61.502 or RCW 46.61.504, effective September 1, 1995.[12] Unlike former RCW 46.61.5052, RCW 46.61.5055 does not provide harsher mandatory minimum penalties for those holding probationary licenses than for those holding regular licenses under similar circumstances.[13]

One of respondents' primary arguments is that a probationary license is punishment under double jeopardy analysis because it subjects its holder to enhanced

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[9] RCW 46.61.5051(1) (repealed 1995).

[10] RCW 46.61.5052(1) (repealed 1995).

[11] *See* Laws of 1995, ch. 332.

[12] Laws of 1995, 1st Sp. Sess., ch. 17.

[13] *See* Laws of 1995, ch. 332; Laws of 1995, 1st Sp. Sess., ch. 17.

mandatory minimum penalties in the future if that person subsequently violates RCW 46.61.502 or RCW 46.61.504. The 1995 statute, RCW 46.61.5055, does not provide enhanced mandatory minimum penalties for persons holding probationary licenses. The 1995 statute would satisfactorily overcome respondents' argument on double jeopardy if it were applied retroactively. But we conclude it applies only prospectively.

A statute is presumed to apply prospectively unless it is remedial in nature or unless the Legislature provides for retroactive application.[14] A remedial statute is one which relates to practice, procedures and remedies and is applied retroactively when it does not affect a substantive or vested right.[15] "A 'right' is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right."[16] There is no legislative indication in the language or history of RCW 46.61.5055 that it is to be applied retroactively.[17] The presumption that RCW 46.61.5055 applies prospectively only is strengthened by the Legislature's use of only present and future tenses in the wording.[18] We conclude that RCW 46.61.5055 should not be applied retroactively,

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[14] *See Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74, 794 P.2d 508 (1990); *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984).

[15] *In re F. D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992); *Miebach*, 102 Wn.2d at 181.

[16] *Department of Retirement Systems v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

[17] *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993).

[18] *Id.*

but applied prospectively only. Accordingly, other 1995 legislative changes to statutes relevant to this case also should not be applied retroactively.[19] We therefore focus our attention on the statutes in effect when Respondents were charged prior to the 1995 changes.

Because there are no disputed facts, we will consider only questions of law, which we review de novo.[20]

Double Jeopardy

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[21] All parties agree the issue here concerns *protection against multiple punishment for the same offense.*

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[19] The Legislature repealed former RCW 46.20.365, which also relates to probationary licenses. In addition, in 1995 it amended sections of the 1994 Act relating to probationary licenses, including former RCW 46.20.355. *See* Laws of 1995, ch. 332 and Laws of 1995, 1st Sp. Sess., ch. 17 (which contains a complete history of the 1995 legislative changes to the 1994 Omnibus Drunk Driving Act).

[20] *State v. Ford*, 125 Wn.2d 919, 891 P.2d 712 (1994), *reconsideration denied* (May 9, 1995); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 311, 884 P.2d 920 (1994).

[21] *U.S. v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989).

The State contends issuance of probationary licenses was a permissible exercise of the State's police power, and not "punishment" contemplated under the double jeopardy clause of the Fifth Amendment to the United States Constitution and Washington Constitution, art. I, § 9.[22] Thus, the State claims the double jeopardy clause does not bar punishment or prosecution of respondents for driving while under the influence of intoxicating liquor.

Respondents contend a probationary license is punishment under the double jeopardy clause because it serves retributive and deterrent purposes and serves no remedial purpose. Respondents rely principally upon the United States Supreme Court case of *United States v. Halper*[23] and the cases following it to support this argument.

Civil Sanctions as "Punishment"

The Supreme Court first decided when a civil penalty may be considered punishment under the double jeopardy clause in *United States v. Halper*.[24] The Court framed

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[22] We do not discuss the State's claim under the Washington State Constitution because the State has not analyzed the factors in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986), to determine whether the state constitution should be independently or more broadly interpreted. This court will not engage in independent state constitutional analysis when a claimant does not adequately brief the *Gunwall* factors. *State v. Maxfield*, 125 Wn.2d 378, 394, 886 P.2d 123 (1994); *State v. Wethered*, 110 Wn.2d 466, 472-73, 755 P.2d 797 (1988).

[23] 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989).

[24] *Id.*

the issue in that case as "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis."[25]

In *Halper*, the Supreme Court stated that "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can *only* be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[26] Respondents rely upon this language to contend that a probationary license is punishment because it does not "solely" serve a remedial purpose.[27] But the Court later in *Halper* announced its explicit holding, which actually departed significantly from its earlier statement:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction *may not fairly be characterized as remedial, but only as a deterrent or retribution*.[28]

Other appellate courts have relied upon and distinguished the explicit holding in *Halper* from the earlier

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[25] *Id.* at 443.

[26] *Id.* at 448 (emphasis added).

[27] Br. of Resp'ts at 8-12.

[28] *Halper*, 490 U.S. at 448-49 (emphasis added).

quoted statement from that same case.[29] Under *Halper*, a probationary license would be considered punishment under double jeopardy analysis only if it "may not fairly be characterized as remedial, but only as a deterrent or retribution."[30]

Respondents claim a probationary license is retributive and serves as a deterrent because it potentially enhances mandatory minimum penalties for the holder who is convicted in the *future* of violating RCW 46.61.502 or RCW 46.61.504.[31] They argue probationary licenses have no remedial purpose. But former RCW 46.20.355 states that "[t]he probationary license shall enable the [Department of Licensing and officers] to determine that the person is on probationary status, including the period of that status for a violation of RCW 46.61.502 or 46.61.504. . . . " Former RCW 46.20.355(4) confirms that probationary licenses serve a remedial purpose because they alert the Department and law enforcement officers to a person's probationary status. As recognized by the State, issuing a probationary license to a driver also informs that person that further violative conduct will not be tolerated.[32] Under that circumstance, issuance of a

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[29] *State v. Hickam*, ___ Conn ___, ___, 668 A.2d 1321, 1324 (1995); *State v. Hanson*, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995), *review granted* (Aug. 9, 1995); *Tench v. Commonwealth*, 21 Va. App. 200, 204-05, 462 S.E.2d 922 (1995).

[30] *Halper*, 490 U.S. at 449.

[31] Compare former RCW 46.61.5051 with former RCW 46.61.5052.

[32] Br. of Resp'ts at 13.

probationary license can fairly be characterized as remedial and does not serve retributive or deterrent purposes only.

The Supreme Court in Halper further explained and narrowed application of its decision by stating, "What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[33]

This case is neither rare nor exceptional. "Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage."[34] This is not a case where a "fixed penalty provision" subjected respondents to a "sanction overwhelmingly disproportionate" to the damage they caused.[35] A probationary license is not a "sanction overwhelmingly disproportionate" to the danger a drunk driver represents on the public highways. The State correctly points out that a probationary license alone does not limit a person's privilege to drive, does not inevitably

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[33] *Halper*, 490 U.S. at 449 (emphasis added).

[34] *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d), at 71 (2d ed. 1987)).

[35] *Halper*, 490 U.S. at 449.

subject a person to imprisonment or monetary penalties, and does not cause a person to forfeit property.[36]

Respondents interpret the *Halper* decision too broadly. *Halper* applies to the "rare case" where a person is subject to a civil penalty "overwhelmingly disproportionate" to the damages that person caused. That circumstance is not present in this case. We conclude the *Halper* decision does not apply to the facts of this case.

Respondents also rely upon *Montana v. Kurth Ranch*[37] in arguing that issuance of probationary licenses is "punishment." At issue in that case was whether a drug tax imposed by the State of Montana could be characterized as punishment for double jeopardy purposes. The Supreme Court in that case recognized that *Halper* decided when a civil penalty might be "punishment" under double jeopardy analysis, but stated "[o]ur answer to that question does not decide the different question whether Montana's tax should be characterized as punishment."[38]

The Court in *Kurth Ranch* held Montana's tax was punishment, but did not rely upon *Halper* in reaching its decision. Recognizing that tax statutes serve a different purpose than civil penalties, the Court agreed *Halper's* method of determining whether the penalty was remedial

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[36] Br. of Appellant at 7. But former RCW 46.20.355(3) and former RCW 46.20.311 did require a $50.00 yearly probationary fee.

[37] ___ U.S. ___, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

[38] 114 S. Ct. at 1944.

or punitive "does not work in the case of a tax statute."[39] In reaching its decision, the Court looked at the particular facts and circumstances surrounding the Montana tax and compared it to similar taxes that were not considered "punishment" for double jeopardy purposes. In doing so, the Court noted that "neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment."[40] Noting the high but valid taxes on cigarettes and alcohol, which may also have a deterrent effect on its users, the Court further stated "[t]hus, while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features . . . do not necessarily render the tax punitive."[41] The Court distinguished the Montana drug tax from other similar taxes to conclude that the tax was "punishment" for double jeopardy purposes.

Any deterrent effect from issuance of probationary licenses in this case does not "automatically" identify it as a form of punishment nor necessarily make it punitive. Respondents argue probationary licenses are a form of punishment. But "whether a sanction constitutes punishment" is not determined from the defendant's perspective because "for the defendant even remedial sanctions carry the sting of punishment."[42]

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[39] 114 S. Ct. at 1948 (quoting with agreement language from the dissenting opinion of Rehnquist, C. J. at 1950).

[40] 114 S. Ct. at 1946.

[41] 114 S. Ct. at 1947.

[42] *Halper*, 490 U.S. at 447 n. 7.

Although the Court in *Kurth Ranch* did not rely upon *Halper* in reaching its decision, it did acknowledge *Halper's* holding that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution."[43]

Respondents rely not only upon expansive language in *Halper*, but also cite *Austin v. United States*[44] and *United States v. $405,089.23 in U.S. Currency*[45] to support their argument that a sanction not "solely remedial" is punishment. In *Austin*, decided before *Kurth Ranch*, the Supreme Court held that the Excessive Fines Clause applied to forfeiture procedures. As respondents argue in this case, the Court in *Austin* pointed to the "solely remedial" language in *Halper* in reaching its decision.[46] But *Austin* involved the Excessive Fines Clause, and did not purport to modify the explicit holding in *Halper* which has been more recently recognized in *Kurth Ranch*.

Under *Halper*, the purposes actually served by the sanction at issue must be assessed in determining whether a civil sanction is "punishment" under double jeopardy analysis.[47] The issuance of probationary licenses

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[43] *Kurth Ranch*, 114 S. Ct. at 1945 (*quoting Halper*, 490 U.S. at 448-49).

[44] ___ U.S. ___, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).

[45] 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of reh'g*, 56 F.3d 41, *cert. granted*, 116 S. Ct. 762, 133 L. Ed. 2d 707 (1995).

[46] *Austin*, 113 S. Ct. at 2812.

[47] 490 U.S at 447 n. 7.

is punishment only if it can be characterized as serving *solely* retributive or deterrent purposes.[48] If their issuance may fairly be characterized as remedial and bears a rational relation to the government's remedial purpose, then it is not punishment for double jeopardy purposes.[49]

We conclude that issuance of probationary licenses in this case was remedial, comporting with the principles in *Halper*. It is true that a probationary license subjects its holder to enhanced minimum mandatory penalties, but that happens only if the person subsequently violates RCW 46.61.502 or RCW 46.61.504.[50] Although a probationary license subjects its holder to fees or potentially harsher minimum penalties, the sanction is rationally related to the government's goal of protecting the public. Probationary licenses may carry with them the "sting" of punishment, but that does not necessarily characterize them as "punishment" for double jeopardy purposes. The Court in *Halper* recognized the government is "entitled to rough remedial justice" in determining whether a sanction could be fairly characterized as remedial or solely punitive for double jeopardy purposes.[51]

Amicus Curiae, Washington Association of Prosecuting Attorneys, referring to *Kurth Ranch*, suggests this Court should look to the historical background of administrative licensing proceedings to determine whether issuance of probationary licenses in this state constitutes

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[48] *Halper*, 490 U.S. at 449.

[49] *Id.*

[50] RCW 46.61.5052 (repealed 1995).

[51] *Halper*, 490 U.S. at 446.

"punishment." The State correctly points out that administrative licensing proceedings in this state have long been considered remedial, and not punitive. Respondents also acknowledge that license revocation or suspension is "clearly remedial, at least in part" because it removes dangerous drivers from the road to the benefit of the public.[52] Revocation of a driver's license is not "punishment" under the double jeopardy clause, but is a permissive exercise of the State's police power to protect users of the public highways.[53] Under *Halper* and the cases following it, a number of state appellate courts have held that revocation or suspension of driver's licenses is not "punishment" for double jeopardy purposes.[54]

Issuance of probationary licenses is a procedure far short of the more drastic ones of suspension or revocation

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[52] Br. of Resp'ts at 14.

[53] *O'Day v. King County*, 109 Wn.2d 796, 817, 749 P.2d 142 (1988); *State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973), *appeal dismissed*, 416 U.S. 964.

[54] *See State v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995), *reh'g denied* (Aug. 14, 1995), *and hearing denied* (Dec. 4, 1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630, 42 Cal. Rptr. 2d 422 (1995), *as modified on denial of reh'g* (Jul. 7, 1995), and *review denied* (Sep. 8, 1995); *Davidson v. MacKinnon*, 656 So. 2d 223 (Fla. Dist. Ct. App.), *review denied*, 662 So.2d 931 (Fla. 1995); *State v. Higa*, 79 Haw. 1, 897 P.2d 928 (1995), *reconsideration denied* (Jun. 13, 1995); *State v. Funke*, 531 N.W.2d 124 (Iowa 1995); *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), *cert. denied*, 116 S. Ct. 1265 (1996); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *State v. Hanson*, 532 N.W.2d 598 (Minn. Ct. App. 1995), *review granted* (Aug. 9, 1995); *State v. Young*, 3 Neb. App. 539, 530 N.W.2d 269 (1995), *review sustained* (May 11, 1995); *State v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995); *State v. Strong*, 158 Vt. 56, 605 A.2d 510 (1992).

of licenses. It ultimately protects users of public highways, and thus, under *Halper*, is fairly characterized as remedial and not solely retributive or deterrent.

CONCLUSION

We conclude that administrative issuance of probationary licenses is not punishment under the double jeopardy clause. We also conclude that RCW 46.61.502 is constitutional. We reverse the decision of the Whitman County District Court granting respondents' motion to dismiss charges of driving while under the influence of intoxicating liquor in violation of the statute and remand for trial in the Whitman County District Court.

/s/ Smith, J. /s/ Dolliver, J.

State v. Doy Lee McClendon, et al.
Majority by Smith, J.
Concurrence by Talmadge, J.
Dissent by Sander, J.

No. 63066-6

TALMADGE, Justice, (concurring). – While I agree with the majority opinion, I do not believe we need to rely on the rather unpredictable course of the United States Supreme Court's double jeopardy jurisprudence to

reach the conclusion in the majority opinion.[1] The present case rises and falls on a single question: is the license action punishment? If it is punishment, jeopardy attaches.

Jurisdictions that have considered the question have overwhelmingly held licensure actions to be remedial, not punishment: *Thompson v. State*, 896 F. Supp. 220 (D. Me. 1995) (suspension of license under Maine statute was not punishment under double jeopardy clause and did not bar subsequent DUI[2] prosecution); *State v. Zerkel*, 900 P.2d 744 (Alaska App. 1995) (revocation of driver's license for refusing to submit to blood alcohol test or

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[1] The dissent relies on our language in *State v. Clark*, 124 Wn.2d 90, 98, 875 P.2d 613 (1994): "[A] forfeiture statute must be solely remedial to escape characterization as 'punishment' under the federal double jeopardy clause." *Clark*, in turn, relied on *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), for the same wording. *Clark*, 124 Wn.2d at 100. Leaving aside the important question of whether the same considerations that apply in the civil forfeiture arena apply in the context of driver license administration, the Supreme Court has decided the "holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence." *United States v. Ursery*, ___ U.S. ___, 116 S. Ct. 2135, 2147, 135 L. Ed. 2d 549 (1996). The dissent evidently believes the Supreme Court is wrong about this and relies heavily on *Austin* for its double jeopardy analysis. We are bound to observe the Supremacy Clause: the Supreme Court's rulings on double jeopardy under the federal constitution control. We have said our state constitution provides no greater double jeopardy protection than the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995).

[2] Many states use different terminology for the crime of driving under the influence of alcohol or drugs (DUI). I use DUI as the reference for all such statutes.

having test results of .10% or higher is remedial for double jeopardy purposes, even though revocation plays a role in deterrence); *Marzolf v. Superior Court*, 185 Ariz. 144, 912 P.2d 1373 (1995) (administrative license suspension for excessive blood alcohol content does not constitute punishment under double jeopardy clause); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630, 42 Cal. Rptr. 2d 422 (1995) (mandatory revocation of driver's license subsequent to criminal punishment for third DUI conviction did not violate motorist's double jeopardy protection against multiple punishments); *People v. Olson*, 921 P.2d 51 (Colo. App. 1996) (prior administrative driver's license revocation for failure to submit to breath or blood alcohol test did not constitute punishment for purposes of double jeopardy clause); *State v. Hickam*, 235 Conn. 614, 668 A.2d 1321 (1995) (90-day administrative license suspension had legitimate remedial purpose of promoting public safety and was rationally related to that purpose, and thus defendant's subsequent criminal prosecution was not barred by double jeopardy principles), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1851, 134 L. Ed. 2d 951 (1996); *Davidson v. MacKinnon*, 656 So.2d 223 (Fla. Dist. Ct. App.) (administrative remedy of suspension of driver's license for DUI or other related behavior is primarily for purpose of enhancing safe driving on public highways and does not bar subsequent criminal prosecution for DUI), *review denied*, 662 So.2d 931 (1995); *State v. Murray*, 644 So.2d 533 (Fla. Dist. Ct. App. 1994) (driver's license suspension did not preclude DUI prosecution on double jeopardy grounds); *Gomez v. State*, 621 So.2d 578 (Fla. Dist. Ct. App. 1993) (no double jeopardy violation

was involved in prosecution of DUI charge after defendant's driver's license was seized because of same conduct); *Martinez v. State*, 221 Ga.App. 483, 471 S.E.2d 551 (1996) (administrative license suspension not punishment for double jeopardy purposes); *State v. Higa*, 79 Haw. 1, 897 P.2d 928 (1995) (acquittal was immaterial for double jeopardy purposes inasmuch as function of Administrative Drivers License Revocation Office proceeding was purely remedial and nonpunitive); *State v. Talavera*, 127 Idaho 700, 905 P.2d 633 (1995) (administrative suspension of defendant's driver's license did not constitute punishment under Double Jeopardy Clause so as to foreclose subsequent prosecution of defendant for DUI arising out of same incident); *People v. Eck*, 664 N.E.2d 1147 (Ill. App. 1996) (statutory summary suspension of driving privileges does not constitute punishment for double jeopardy purposes); *Schrefler v. State*, 660 N.E.2d 585 (Ind. App. 1995) (administrative suspension of driving privileges was not punishment); *State v. Kocher*, 542 N.W.2d 556 (Iowa 1996) (double jeopardy clause does not bar prosecution of defendant in DUI case if defendant's license has previously been suspended through administrative proceedings); *State v. Savard*, 659 A.2d 1265 (Me. 1995) (revocation or suspension of driver's license is not punishment, and, thus, prosecution for DUI following administrative suspension of license for DUI is not barred by state and federal double jeopardy clauses); *State v. Mertz*, 258 Kan. 745, 907 P.2d 847 (1995) (double jeopardy did not bar prosecution of defendant for driving under the influence of alcohol after defendant's driver's license was administratively suspended); *Leduc v. Commonwealth*, 421

Mass. 433, 657 N.E.2d 755 (1995) (administrative suspension of driver's license for taking and failing breathalyzer test is not punishment for double jeopardy purposes); *Johnson v. State*, 95 Md.App. 561, 622 A.2d 199 (1993) (administrative sanction previously imposed on motorist based on same underlying activity, consisting of two-month suspension of his driving privileges, did not rise to level of punishment or penalty sufficient to trigger double jeopardy concerns when motorist was subsequently prosecuted for vehicular offenses); *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995) (temporary administrative suspension of driver's license does not constitute punishment under the law of double jeopardy found in the United States Constitution or under Maryland common law), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1265, 134 L. Ed. 2d 213 (1996); *City of New Richland v. VanEngelenburg*, 543 N.W.2d 634 (Minn. 1996) (civil driver's license revocation for DUI was not punishment for double jeopardy purposes); *State v. Hanson*, 543 N.W.2d 84 (Minn. 1996) (civil driver's license revocation pursuant to implied consent statute for driving under the influence did not bar subsequent criminal prosecution for same conduct under double jeopardy principles); *State v. Mayo*, 915 S.W.2d 758 (Mo. 1996) (suspension or revocation of driver's license for driving with unlawful blood alcohol content was not punishment implicating double jeopardy clause), *cert. denied*, ___ U.S. ___, 117 S. Ct. 61, ___ L. Ed. 2d ___ (1996); *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996) (administrative license revocation primarily served remedial purpose and thus did not impose punishment for double jeopardy purposes); *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996) (double jeopardy clauses did

not bar DUI prosecution after driver's license had been administratively revoked for failure of alcohol breath test), *cert. denied*, ___ U.S. ___, 116 S. Ct. 2509, 135 L. Ed. 2d 198 (1996); *State v. Cassady*, 140 N.H. 46, 662 A.2d 955 (1995) (previous administrative review hearing for suspension of driver's license did not bar prosecution of defendant for driving under the influence of liquor, for double jeopardy purposes); *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 904 P.2d 1044 (N.M. 1995); *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (N.C. 1996) (ten-day driver's license revocation and $50 license restoration fee do not constitute punishment and do not bar subsequent DUI prosecution under double jeopardy clause); *State v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995) (driver's license revocation under Implied Consent Act is not punishment for purposes of double jeopardy clause); *State v. Gustafson*, 76 Ohio St. 3d 425, 668 N.E.2d 435 (1996) (civil sanction imposed as a result of administrative license suspension proceeding was not punishment for double jeopardy purposes so long as length of suspension did not extend beyond conviction and sentencing); *Kane v. State*, 915 P.2d 932 (Okla. Crim. App. 1996) (administrative revocation of defendant's driver's license under implied consent statutes did not constitute punishment for double jeopardy purposes); *State v. Phillips*, 138 Or. App. 468, 909 P.2d 882 (administrative suspension of driver's license for driving under influence of intoxicants does not constitute punishment for double jeopardy purposes), *review denied*, 323 Or. 114, 913 P.2d 1384 (1996); *Martin v. Commonwealth*, 672 A.2d 397 (Pa. Commw. Ct.

1996) (automatic suspension of driver's license as consequence of drug conviction does not violate double jeopardy clause); *State v. Talavera*, 905 P.2d 633 (Idaho 1995) (administrative suspension of defendant's driver's license did not constitute punishment for double jeopardy purposes foreclosing subsequent prosecution for DUI arising out of same incident); *Ex parte Vasquez*, 918 S.W.2d 73 (Tex. App. 1996) (DUI prosecution following administrative license suspension for refusing to submit to breath test does not violate the protection against double jeopardy); *State v. Arbon*, 909 P.2d 1270 (Utah App.) (administrative license suspensions for DUI did not constitute punishment for double jeopardy purposes), *cert. denied*, 916 P.2d 909 (1996); *Tench v. Commonwealth*, 21 Va. App. 200, 462 S.E.2d 922 (1995) (automatic suspension of defendant's driver's license for failing breath test did not constitute punishment for double jeopardy purposes); *State v. O'Brien*, 158 Vt. 275, 609 A.2d 981 (1992) (administrative suspension proceeding is not criminal in nature).[3] *But see United States v. Imngren*, 914 F. Supp. 1326 (E.D. Va. 1995) (administrative suspension of driver's license for one year on all military installations constitutes punishment for double jeopardy purposes); *State v. Ackrouche*, 70 Ohio Misc.2d 34, 650 N.E.2d 535 (1995) (Franklin County Municipal Court holds because administrative license suspension was punishment imposed in separate proceeding for same conduct which was subject of prosecution pursuant to drunk driving law, double jeopardy

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[3] Even Justice Stevens, the lone dissenter in *Ursery*, suggested "administrative licensing sanctions are remedial." *Ursery*, 116 S. Ct. at 2161 n.23.

clauses of United States and Ohio Constitutions barred criminal prosecution on that charge).

Even if one were to disagree, as the dissent does, with the multitudes of our colleagues nationwide who have held drivers license revocations and suspensions are not punishment for double jeopardy purposes, the probationary status complained of in the present case imposes no immediate sanction whatsoever on the licensee, and cannot possibly be considered punishment.[4] Placing a driver on probationary status is less onerous than the revocations and suspensions other jurisdictions hold not

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[4] A statutory scheme providing an enhanced criminal sentence in the future based upon a purely administrative action in the past might raise serious due process (not double jeopardy) concerns. Justice Alexander correctly observes in his concurrence in the dissent, "the probationary license is treated as a prior DUI conviction whether or not the holder of that license is ultimately convicted of the charge which resulted in the issuance of the probationary license." Concurrence in Dissent at 1. That question is not before us now, and we need not address it.

to be punishment.[5] Accordingly, the challenged action in this case is not punishment.

/s/ Talmadge, J.
/s/ Guy, J.
/s/ Durham CJ.

State v. McClendon (Doy Lee)
Majority by Smith, J.
Concurrence by Talmadge, J.
Dissent by Sanders, J.
Concurrence in dissent by Alexander, J.

No. 63066-6

SANDERS, J. (dissenting) – The Fifth Amendment's prohibition against double jeopardy is absolute:

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[5] The dissent's conclusion that the issuance of a probationary license is punishment is strange. As a consequence of the issuance of the probationary license in this case, precisely nothing happened to the respondents. They were not deprived of life, limb, liberty, or property. Nor was there any effect whatsoever on their privilege to drive in Washington. In fact, even though their BAC Datamaster tests indicated they were driving with more than the legal limit of alcohol in their systems, they have not been tried for drunk driving because the court below dismissed the charges against them. The respondents have not been punished. "The risk to which the [Double Jeopardy] Clause refers is not present in proceedings that are not 'essentially criminal.' " *Breed v. Jones*, 421 U.S. 519, 528, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). It is only upon the contingency of a *future* charge for DUI that the effect of the probationary license springs to life. I cannot comprehend how the Double Jeopardy Clause can apply to something that has not yet happened, and may never happen, to require dismissal of the DUI charges in this case.

" . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . . " U.S. Constitution, Amendment Five. This clause prohibits multiple punishments for the same offense. *United States v. Halper,* 490 U.S. 435, 448, 109 S. Ct. 1892, 1902, 104 L. Ed. 2d 487 (1989).

If reclassifying allegedly intoxicated drivers to "probationary" status is a form of punishment, the initiation of a criminal proceeding to again punish the same conduct violates the double jeopardy clause and the DUI charge must be dismissed. I agree with the trial court that these defendants have been unconstitutionally placed in jeopardy of punishment twice for the same conduct and would affirm the trial court's dismissal. I therefore dissent from the contrary conclusion reached by the majority.

The majority opinion rests upon two propositions: (1) summary license revocation with probationary license substitution is not punishment and (2) a sanction which is only partially punitive does not place one in jeopardy. I disagree, and doubly so.

This probationary license does not alter one's privilege to drive but puts the driver in a special class of drivers singled out for enhanced jail time.[1] This

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[1] *Compare* RCW 46.61.5051 (repealed by Laws 1995, ch. 332, § 21), Alcohol violator with regular license – penalties *with* RCW 46.61.5052 (repealed by Laws 1995, ch. 332, § 21), Alcohol violator with probationary license – penalties. Under the 1994 statutory scheme, a driver with a "regular" nonprobationary license and no DUI convictions within the past five years and whose breath test exceeded .10 but was below .15, faced a

reclassification is, in itself, punitive because its purpose is to deter future criminal misconduct. This defendant is put in jeopardy twice for the same conduct because (1) his license has been revoked and supplemented with a probationary license and (2) DUI criminal charges have been filed as a result of the same incident.

Is this probationary license punishment?

The majority opines, "[P]robationary licenses serve a remedial purpose because they *alert* the Department and law enforcement officers to a person's probationary status." Majority at 13-14 (emphasis added). Why alert the authorities? Do the authorities simply have inquiring minds or do they need to be "alerted" so they will impose more jail time, next time?

The majority's analysis is difficult because any alleged distinction between "remedial" and "punishment" is incoherent; punishment is simply one form of remedy. Another form of remedy might be nonpunitive; however, "remedy" includes both. *See* Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, Ethics 348 (July 1978). I have therefore substituted the alternate

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mandatory one-day minimum in jail and a ninety-day license suspension. Under similar circumstances, a driver with a probationary license faced a mandatory seven days in jail and a one-year license revocation, even if it was a first conviction. The probationary license lasted for a period of five years from the date the probationary status was imposed. RCW 46.20.355(2), RCW 46.61.5051(4) (repealed by Laws 1995, ch. 332, § 21). The probationary license status continued whether or not there were DUI charges, much less a DUI conviction.

generic term "sanction" to include all possible sanctions of a punitive or nonpunitive nature. Double jeopardy applies to punitive sanctions.

When the majority says "[P]robationary licenses serve a remedial purpose" it fails to tell us whether this "remedy" is punitive or otherwise, but apparently assumes "otherwise." Under this statute the only sanction imposed by the probationary license is to substantially enhance mandatory criminal penalties to be imposed upon the driver's second DUI conviction if arrested while driving with a probationary license. The question is therefore whether this sanction – reclassification to potentially heightened criminal penalties – is "punishment" in itself for the same conduct which led to the DUI charges. Certainly, it is conceded, both the probationary license and the DUI charges result from the same conduct.

If a probationary license imposed under this particular statute is a sanction of a punitive nature, it must be so recognized for double jeopardy purposes.

When considering the problem, I certainly agree with the majority and concurrence that not all sanctions are punitive while some certainly are.

Nonpunitive sanctions might include, for example, compensatory damages, restitution, and forfeiture of stolen property for return to its rightful owner. Punishment, on the other hand, would certainly include penal incarceration as well as the *threat* of incarceration to deter future criminal acts.

Reclassifying one's license status to "probationary" under this particular statute does not affect the right or

scope of the defendant's driving privileges; however, it does subject him to mandatory enhanced penalties should he be arrested on a subsequent occasion. The sole purpose of this reclassification is simply to deter the driver from committing another DUI through threat of enhanced punishment. However, deterrence *is* punishment for double jeopardy purposes. *Halper*, 490 U.S. at 448. Substitution of the probationary license for the normal license is punishment in itself without regard to whether there ever is a subsequent DUI arrest, conviction, or enhanced penalty[2] because it is a licensing status change for the sake of deterrence.

The concurring opinion cites multiple decisions from other jurisdictions essentially holding license suspensions and limitations are nonpunitive sanctions and, thus, do not constitute punishment for double jeopardy purposes. However, those cases may be generally distinguished because they involve administratively removing a driver from the road, or restricting his right to drive in some fashion, whereas the statute at issue changes the licensing status of the driver simply to threaten an enhanced criminal penalty for any subsequent DUI.[3]

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[2] The concurrence states " . . . the probationary status complained of in the present case imposes no immediate sanction whatsoever on the licensee, and cannot possibly be considered punishment." Concurrence at 7-8. I disagree. The "immediate sanction" is revocation of the standard license and substitution of the probationary license. This substitution is punishment because its purpose is deterrence.

[3] The concurrence cites *State v. Gustafson*, 76 Ohio St. 3d 426, 668 N.E.2d 435 (1996) for the proposition that a "civil sanction imposed as a result of administrative license

A few cases hold an administrative suspension of one's license to drive punitive for double jeopardy purposes, *see, e.g., State v. Ackrouche*, 70 Ohio Misc. 2d 34, 650 N.E.2d 535 (1995), however, such cases must be distinguished for the same reason.

Any double punishment violates double jeopardy

The majority opines that unless a sanction is *solely* for punishment, the sanction is outside the protection of the double jeopardy clause, citing *Halper*, 490 U.S. at 448. However this conclusion is not supported by the literal language of *Halper*, is inconsistent with other, and subsequent, United States and Washington Supreme Court precedents, and is overtly inconsistent with the constitutional text.

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suspension proceeding was not punishment for double jeopardy purposes." Concurrence at 6. *Gustafson* must be distinguished because it involves an immediate license suspension which removes the driver from the road. Nevertheless, the opinion affirmatively adds even a summary sanction may not continue beyond the DUI trial, for to do so would violate the constitutional double jeopardy prohibition against multiple punishments for the same offense. ("We therefore hold that an administrative license suspension ceases to be remedial and becomes punitive in nature to the extent it is deemed to continue subsequent to conviction and sentencing for violation of [the DUI statute]." 668 N.E.2d at 448.) I note the probationary license at issue here survives the trial (whatever the result) for five years. RCW 46.20.355(2), RCW 46.61.5051 (repealed by Laws 1995, ch. 332, § 21). Therefore it not only violates double jeopardy but even continues to punish those who are acquitted for the alleged predicate criminal conduct.

Halper states:

> We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . [I]t follows that a civil *sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment,* as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Halper, 490 U.S. at 448-49. (Emphasis added.) *Halper* holds a sanction not "solely remedial" is punishment for double jeopardy purposes. *See* Carlos F. Ramirez, *Administrative License Suspensions, Criminal Prosecution, and the Double Jeopardy Clause,* 23 Fordham Urb. L.J. 923, 927-38 (1996). *Halper,* read as a whole, demonstrates the Supreme Court is faithful to the spirit and meaning of the double jeopardy clause, which prevents double punishment even though one or both of those punishments may also be accompanied by other nonpunitive sanctions or goals. But the construction placed on this language by the majority would have the Supreme Court contradicting itself within the same paragraph. Further, the majority's reading contradicts the plain meaning of the *Halper* text by ignoring the words "to the extent," which support the proposition that unless the sanction is "solely to serve a remedial purpose" it is to that "extent" not remedial but punitive.

The majority's claim that one may be subject to multiple punishments without violating the double jeopardy clause provided only there be at least some nonpunitive sanction imposed in addition to the punishment or, in the alternative, that the punishment might also promote a nonpunitive objective, is double-talk. The Fifth Amendment forbids multiple punishments without regard to motive and without regard to the additional imposition of nonpunitive sanctions.

Subsequent Supreme Court cases of *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994); *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); and *United States v. Ursery*, ___ U.S. ___, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996) deal with the same or related topics and are consistent with *Halper*.

Civil forfeiture cases distinguished

Austin and *Ursery* were both civil forfeiture[4] cases arising from the Eighth Amendment prohibition against excessive fines. Thus, they arise in a different factual context and are analyzed under a completely separate and distinct constitutional clause. Nevertheless, each purports to discuss "punishment" for the purpose of the Eighth Amendment excessive fines clause.

Austin involved a civil forfeiture proceeding against a body shop and mobile home after its owner pleaded

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[4] *Cf.* Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. Sch. L. Rev. 311 (1994) (forfeiture in general has gotten out of hand).

guilty to a drug offense. The government defended its action under the excessive fines clause, claiming the civil forfeiture was not "punishment" and thus could not be an excessive fine under the Eighth Amendment. Relying on *Halper* "that civil proceedings may advance punitive and remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties," *Austin,* 113 S. Ct. at 2806 (citing *Halper,* 490 U.S. at 447), the Court held:

> [T]he question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.
>
> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. *We, however, must determine that it can only be explained as serving* ***in part*** *to punish.*

Austin, 113 S. Ct. at 2806 (emphasis added). *Austin* therefore seems to apply the *Halper* double jeopardy analysis to the excessive fines clause.

Later *Austin* restates the same point: "Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve *some* remedial purpose, the Government's argument must fail." *Id.* at 2812. *Austin* therefore relies upon the same language in *Halper* which is relied upon by the respondents here, but in a forfeiture context. It emphasizes in footnote 14 that the nature of the inquiry is whether the sanction is "simply" or "purely" remedial (in which case

it is not a punishment) or whether it has *any* punitive characteristics (in which case it must be considered a punishment for the purpose of the excessive fines clause).

In *Ursery* a majority of the United States Supreme Court held civil forfeiture, an in rem proceeding, cannot be punishment for the purpose of the double jeopardy clause of the United States Constitution although it may be excessive for the purpose of the excessive fines clause. But for a "fine" to be excessive it must first be a fine – and *Ursery* holds forfeitures are not fines. This may be debatable; however, it does not purport to affect the Court's previously established double jeopardy analysis.

While careful to distinguish civil forfeitures from all other types of sanctions, a footnote to the majority opinion discusses the *Halper* case in the context of Justice Stevens's dissenting opinion. *Ursery,* 116 S. Ct. at 2145 n.2. There the Court observed:

> Whether a particular sanction "cannot fairly be said solely to serve a remedial purpose" is an inquiry radically different from that which we have traditionally employed in order to determine whether, as a categorical matter, a civil sanction is subject to the double jeopardy clause. . . . If the "general rule" of Justice Stevens were applied literally, then virtually every sanction would be declared to be a punishment: It is hard to imagine a sanction that has no punitive aspect whatsoever.

The context of the footnote suggests the Court was primarily interested in stating even if civil forfeitures are purely or partially punitive that does not subject them to double jeopardy analysis in any event. In dissent Justice

Stevens disagreed. Even so, it is clear the majority distinguished forfeitures from all other types of sanctions, drawing a "sharp" distinction between in rem forfeiture and in personam civil penalties.[5] *Ursery,* 116 S. Ct. at 2141-142.

Punitive civil sanction cases

Kurth Ranch addressed the double jeopardy question directly in the context of a nonforfeiture Montana tax on illicit drugs. It is the seminal case because it is the United States Supreme Court's last word on the subject at hand. The issue in *Kurth* was whether or not the tax "has punitive *characteristics* that subject it to the constraints of the Double Jeopardy Clause." *Kurth,* 114 S. Ct. at 1945 (emphasis added). The Court found it did and applied double jeopardy to bar the parallel criminal charges.

As in *Kurth,* the like question here is whether this probationary license status has any *punitive characteristics.* If so it is punishment for double jeopardy purposes, and the DUI charges must be dismissed. *See also United States v. Hudson,* 14 F.3d 536 (10th Cir. 1994).[6]

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[5] By its own terms, *Ursery* is clearly limited to in rem civil forfeiture cases. "*Halper* dealt with in personam civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause. . . . None of those cases dealt with the subject of this case: in rem civil forfeitures for purposes of the Double Jeopardy Clause." *Ursery,* 116 S. Ct. at 2147, 135 L. Ed. 2d at 567-68.

[6] [I]f a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite

Both the concurrence to the majority and the concurrence to this dissent argue an inconsistency between the Supreme Court's analysis in *Ursery* and the Supreme Court's analysis in *Halper* and *Kurth*, and thus claim the *Ursery* analysis should be followed in the case at bar because *Ursery* is the most recent of the three. Citing language in *Ursery* to the effect that an excessive fines clause analysis in the Austin forfeiture case should not be "imported" into double jeopardy cases not involving forfeiture or excessive fines, Concurrence at 1 n.1 (citing *Ursery*, 116 S. Ct. at 2147), the concurrence suggests the dissenting opinion does not follow *Ursery* because "the dissent evidently believes the Supreme Court is wrong [in *Ursery*]. . . . " This misses the point.

Whether or not the Supreme Court dropped the ball in *Ursery* (and there is substantial scholarly comment to that effect)[7] is not material to the resolution of this case

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> that fact that the sanction is also remedial. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes. We therefore must conclude that if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis.

Hudson, 14 F.3d at 540.

[7] *See, e.g.*, Jeffrey Steinborn, *United States v. Ursery; United States v. $405,098.23: Supreme Court closes double jeopardy door*, Washington Criminal Defense 10, 11 (Nov. 1996) ("[R]ead the *Ursery* opinion. I recommend some form of sedation as a prelude. But if you want to know what it means, that's simple: The Supreme Court has indulged the government and given it

because *Ursery* was a forfeiture case decided under the excessive fines clause of the Eighth Amendment whereas the case at bar must be decided under the double jeopardy clause of the Fifth Amendment, as construed by *Halper* and *Kurth Ranch*. As stated in *Gustafson*, 668 N.E.2d at 442 n.2 (relied upon by the concurrence at 6): "*Ursery* does not control disposition of these [licensing] causes before us, which do not involve interim forfeitures. . . . "

State cases on double jeopardy

State v. Clark, 124 Wn.2d 90, 98, 100, 875 P.2d 613 (1994) applied a double jeopardy standard to forfeiture facts. The question there was whether or not a civil forfeiture statute in combination with criminal sanctions violated state or federal prohibitions against the imposition of double jeopardy. A unanimous court held, "[A] forfeiture statute must be *solely remedial* to escape characterization as 'punishment' under the federal double jeopardy clause." *Clark*, 124 Wn.2d at 98. *Clark* construed *Austin* to hold "[i]f the civil forfeiture statute is at all punitive, it is to be deemed 'punishment.' " *Clark*, 124 Wn.2d at 100. A majority of this court arguably reached the same result in *State v. Cole*, 128 Wn.2d 262, 295, 297,

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carte blanche to loot."); Roger Pilon, *Forfeiting Reason*, 3 Regulation 15, 18 (1996) (the reasoning of *Ursery* opinion is result-oriented, circular, and incoherent); *cf.* Pilon, *supra* note 4; Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. Contemp. Legal Issues 199 at n.64 (1996) (the departure taken from existing law by *Michigan v. Bennis*, 116 S. Ct. 1560 (1996) and *Ursery* is mistaken).

300, 906 P.2d 925 (1995) wherein it construed *Austin* and *Clark* to require a double jeopardy analysis unless the sanction "serves *solely* a remedial purpose." *Cole*, 128 Wn.2d at 295 (Johnson, J., dissenting).[8]

Whether *Clark* and *Cole* are consistent with *Ursery*'s federal (not state) forfeiture analysis remains to be seen; however, clearly these cases facially define the punishment standard for double jeopardy purposes – which is the issue presented by this case.

I conclude that this probationary license is wholly punitive, and nothing else. It does not revoke or limit the licensed driver's privilege to drive but is there to *deter* a subsequent DUI by enhancing the applicable mandatory minimum jail time. If that isn't punishment, what is? Even if there were also nonpunitive aspects, double jeopardy would still bar the criminal prosecution. I dissent.

/s/ Sanders, J.

State v. McClendon
Majority by Smith, J.
Concurrence by Talmadge, J.
Dissent by Sanders, J.
Concurrence in Dissent by Alexander, J.

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[8] *See* Andrew L. Subin, *The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation*, 19 Seattle U. L. Rev. 253, 262 Winter 1996 ("A nominally civil sanction, an in rem forfeiture, or a tax, [or a license probation] is punitive unless it serves a solely remedial purpose.")

No. 63066-6

ALEXANDER, J. (concurring in dissent) – I concur in the dissent. I do so because I agree with Justice Sanders that the issuance of a probationary driver's license, pursuant to former RCW 46.61.5052, has no remedial purpose. Its only purpose, as the dissent observes, is punitive in that it has the effect of increasing the punishment of the probationary licensee on his or her subsequent offense for DUI. Dissenting op. at 3-7. In essence, the probationary license is treated as a prior DUI conviction whether or not the holder of that license is ultimately convicted of the charge which resulted in the issuance of the probationary license.

I write separately only because I disagree with the view expressed in the dissent that if a sanction is partially remedial and partially punitive, it always violates the Double Jeopardy Clause of the United States Constitution. Dissenting op. at 7-9. In reaching that conclusion, the dissent relies primarily on *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) in which the Court said that "it follows that a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (Emphasis added).

The *Halper* case has, however, been undercut somewhat by the recent case of *United States v. Ursery*, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). Regarding that case, the Court said that if the language of that case was to be "applied literally, then virtually every sanction would be

declared to be a punishment: it is hard to imagine a sanction that has no punitive aspect whatsoever." *Ursery*, 116 S. Ct. at 2146 n.2. In *Ursery*, the Court explicitly stated the test that should be employed to determine when a civil sanction is punitive. It said that a sanction is punishment if either (1) it is intended by Congress to be criminal or (2) " 'whether the statutory scheme was so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism.' " *Ursery*, 116 S. Ct. at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)).

It is not difficult to conceive of a statutory scheme in which a requirement that probationary licenses be issued to first time DUI offenders could have a predominantly remedial effect. If, for example, the Legislature had provided that a person with a probationary license could only drive from 9:00 a.m. to 6:00 p.m., the overriding effect of the provision would be remedial because the provision would have the effect of removing the offending driver from the highway during the hours that drinking and driving is most prevalent. Although, arguably, such a restriction on driving is punitive, that aspect of the sanction does not detract from its main thrust, which is remedial.

Under the legislative scheme we have here, however, there is no such remedial effect. The probationary license does not inhibit the licensee's privilege to drive in any way and, consequently, it is impossible to conclude that it has any effect other than to enhance punishment. That being the case, double jeopardy protections are triggered.

Moreover, because the issuance of a probationary license under RCW 46.61.5051 has no remedial effect, the multi-page string citation of authority in the concurrence is largely irrelevant. It is true that administrative revocation or suspension of a driver's license may well have a remedial rather than punitive effect, and thus prove to be no bar on double jeopardy grounds to a criminal prosecution. However, this conclusion simply begs the question in this case, which is whether the probationary license at issue is remedial. Unlike a revocation or a suspension, the probationary license here has no effect other than to punish.

/s/ Alexander, J.
I agree /s/ Madsen, J.
I agree /s/ Johnson J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. DOY LEE McCLENDON, GILL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEPHEN STARK, BRIAN HAYTON and MARK BOOTH, Respondents.	MANDATE NO. 63066-6 Whitman County No. 95-1-00040-6 Whitman County District Nos. 95-10003D, 94-1638D, 95-1066D, 95-1053Y, 95-1021D, 95-1122D, 95-1162D & 95-1165D

THE STATE OF WASHINGTON TO: The Whitman County District Court

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 1, 1997, became the decision terminating review of this court in the above entitled cause on May 21, 1997. This cause is remanded to the district court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs will be taxed by supplemental judgment.

(Seal)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of June, 1997.

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Deputy Clerk of the Supreme Court,
State of Washington

cc: Hon. James Kaufman
Whitman County Prosecutor
Timothy Esser
Michael Pettit
Jeffrey Jahns
Pamela Loginsky
James Schmid

APPENDIX C

[No. 63066-6. En Banc.]

Argued January 18, 1996. Decided May 1, 1997.

THE STATE OF WASHINGTON, *Appellant*, v. DOY LEE MCCLENDON, ET AL., *Respondents*.

[1] **Courts – Rules of Court – Waiver – Supreme Court.** The Supreme Court may waive a court rule in the interests of justice in order to reach a significant question deserving of prompt resolution.

[2] **Courts of Limited Jurisdiction – Appeal – Direct Review by Supreme Court.** An appeal of a decision of a court of limited jurisdiction may be certified or transferred from the superior court directly to the Supreme Court in the interests of justice and upon the Supreme Court's waiver of RALJ 1.1(a).

[3] **Statutes – Construction – Retroactivity – Amendment – In General.** A statutory amendment is presumed to apply prospectively unless the Legislature has expressly indicated its intent that the amendment apply retroactively or the amendment is remedial in nature. An amendment is remedial in nature if it relates to practice, procedures, and remedies and does not affect a substantive or vested right. A "right" is a legal consequence deriving from certain facts; a "remedy" is a procedure prescribed by the law to enforce a right.

[4] **Statutes – Construction – Retroactivity – Amendment – Present and Future Tense**

Terminology – Effect. The presumption that a statutory amendment applies prospectively and not retroactively is strengthened by the Legislature's use of only present and future tenses in the wording of the amendment.

[5] **Appeal – Review – Issues of Law – Standard of Review.** Questions of law are reviewed de novo by an appellate court.

[6] **Criminal Law – Former Jeopardy – Multiple Punishments – What Constitutes – Civil Sanction – Test.** A civil sanction constitutes "punishment" for purposes of the double jeopardy clause of the Fifth Amendment only if it provides for a fixed penalty and, in application, the sanction cannot fairly be characterized as remedial in that it serves retributive or deterrent purposes to a degree overwhelmingly disproportionate to the damage caused. A civil sanction does not constitute "punishment" if it may fairly be characterized as remedial and it bears a rational relationship to the government's remedial purpose. [Note: Only two Justices concur in the above statement.]

[7] **Criminal Law – Former Jeopardy – Multiple Punishments – What Constitutes – Civil Sanction – Determination.** For purposes of the double jeopardy clause of the Fifth Amendment, whether a civil sanction constitutes "punishment" is not determined from the perspective of the party bearing the burden of the sanction.

[8] **Criminal Law – Former Jeopardy - Multiple Punishments – What Constitutes –**

Issuance of Probationary License. A probationary license issued under former RCW 46.20.365 to a motorist who has been tested as having a breath alcohol concentration of .10 percent or higher, the effect of which is to subject the motorist to harsher mandatory minimum penalties under former RCW 46.61.5052 for future violations of the driving under the influence of an intoxicant statutes, is remedial and does not constitute "punishment" for purposes of the double jeopardy clause of the Fifth Amendment.

TALMADGE, J., DURHAM, C.J., and GUY, J., concur by separate opinion; ALEXANDER, JOHNSON, and MADSEN, JJ., concur in the dissent by separate opinion; SANDERS, J., dissents by separate opinion.

Nature of Action: Prosecutions for driving under the influence of an intoxicant.

District Court: The Whitman County District Court, Nos. 951003D, 941638D, 951066D, 951053Y, 951021D, 951122D, 951162D, and 951165D, David Frazier, J., dismissed the prosecutions on May 1, 1995.

Supreme Court: Holding that the defendants had not been placed in double jeopardy by being prosecuted for driving under the influence of an intoxicant after having previously been issued statutorily required probationary licenses on the basis of test results showing that each of them had a breath alcohol concentration of .10 percent or higher or at about the time of arrest, the court *reverses* the dismissals and *reinstates* the prosecutions.

James Kaufman, Prosecuting Attorney, for appellant.

Nuxoll, Libey, Ensley, Esser & Campbell, by *Timothy Esser*; and *Wiley & Pettit*, by *Michael J. Pettit*, for respondents.

Russell D. Hauge, Prosecuting Attorney for *Kitsap County*, and *Jeffrey Jahns* and *Pamela B. Loginsky, Deputies*, on behalf of Washington Association of Prosecuting Attorneys and Department of Licensing, amici curiae.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

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ALR Index, Double Jeopardy.

SMITH, J. – The parties and a judge of the Whitman County Superior Court jointly seek review of a Whitman County District Court decision granting the respondents' motion to dismiss charges of driving while under the influence of intoxicating liquor in violation of RCW 46.61.502. We granted review. We reverse and remand for trial.

QUESTION PRESENTED

The sole question presented in this case is whether it is unconstitutional double jeopardy for the State of Washington to prosecute respondents for violation of RCW 46.61.502, driving a vehicle while under the influence of intoxicating liquor, when the Department of Licensing has previously issued each respondent a probationary license after test results showed each had a breath alcohol level of .10 percent or higher.

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(2)

FILED

OCT 24 1997

CLERK

No. 97-166

In The

Supreme Court of the United States

October Term, 1997

DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEVEN McMILLAND and PAUL AHMANN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari
To The Washington State Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES H. KAUFMAN
Whitman County Prosecuting Attorney
Counsel of Record
404 North Main Street
PO Box 30
Colfax, WA 99111-0030
(509) 397-6250
(509) 397-3989 [fax]
Attorney for State of Washington

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Under Washington State's former statutory scheme relating to issuance of a probationary license where an individual showed, at the time of arrest, a breath alcohol level of .10 percent or more and the individual is issued a license which can result in an enhanced jail sentence should the individual be convicted in the future of DUI arising from a new incident, is the Double Jeopardy Clause of the U.S. Constitution violated?

2. Does the issuance of a probationary license status constitute punishment as that term is considered under federal double jeopardy analysis?

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I. STATEMENT OF THE CASE

As Petitioners note, this case involved a challenge to Washington State's statutory scheme enacted in 1994 by Laws of Washington 1994, Chapter 275. The statutes enacted in 1994, RCW 46.61.5051 and RCW 46.61.5052, were repealed in 1995, effective September 1, 1995. See Laws of 1995, 1st. Sp. Sess., ch. 17 and Laws of 1995, ch. 332, sec. 21; Laws of 1995, 1st, Sp. Sess., ch. 17, *State v. McClendon,* 131 Wn.2d 853, 860, 935 P.2d 1334 (1997).[1]

Further, Petitioners have properly set for the Findings of Fact and Conclusions of Law adopted by the Whitman County District Court, the trial court. For the Court's full review and consideration, the Respondent has attached, as Appendix "A", the Agreed Narrative of Report of Proceedings signed by the Whitman County District Court Judge, the Honorable David J. Frazier, on June 16, 1995.[2]

It is sufficiently important to note that these individuals have never faced trial in the criminal court nor have their licenses been suspended in any fashion. They have merely had a "probationary status" attached to their licenses in the form of an asterisk (*).

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[1] RCW 46.20.365(3)(a) relating to issuance of probationary licenses was also repealed in 1995. See *McClendon* at 859, footnote 8.

[2] It should be noted that the Appendix A lists eight (8) Respondents to the District Court's action. The first five (5) Respondents are Petitioners before this Court. The other three (3) have since abandoned this litigation.

It is further true that if these Petitioners had been *convicted* on a further and subsequent driving while under the influence of drugs or alcohol (DUI) charge committed prior to September 1, 1995, they would have been given a minimum sentence of seven (7) days in jail, even if they were acquitted of the current charge which the Washington State Supreme Court reinstated in *State v. McClendon*. Compare Laws of Washington 1996, ch. 307(3) currently codified in RCW 46.61.5055 with the former RCW 46.61.5051 and RCW 46.61.5052. No record exists indicating this occurred to any petitioner.

II. ARGUMENT

A. Washington's former statutory scheme relating to issuance of probationary licenses with enhanced penalties upon future DUI convictions does not violate the Double Jeopardy Clause of the United States Constitution?

Petitioners suggest this Court issue a Writ of Certiorari largely based upon the fact, according to Petitioners, that *Ball v. United States*, 470 U.S. 856, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985) mandates such, and that *United States v. Ursery*, ___ U.S. ___, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996) is largely irrelevant. Respondent respectfully asserts that Petitioners have misinterpreted *Ball*, and have clearly underestimated the effect and holdings of *Ursery*.

Specifically, it is important to note that *Ball* involved multiple convictions for receiving (unlawfully) a firearm that had traveled in interstate commerce in violation of 18 U.S.C. § 922(h)(1) and being a felon in possession of such

firearm in violation of 18 U.S.C. App. § 1202(a)(1) out of the *same* criminal act.

In reversing and remanding for retrial one of the two convictions against Mr. Ball, this Court held:

> "We hold that Congress did not intend a convicted felon in Ball's position to be convicted of both receiving a firearm in violation of [18 U.S.C. § 922(h)(1)] and possessing that firearm in violation of [18 U.S.C. App. § 1202(a)].

470 U.S. at 865.

It is important to note that this Court was interpreting a federal statute, just as the Washington Supreme Court did with former RCW 46.61.5051 and RCW 46.61.5052 and current RCW 46.20.365 and RCW 46.20.355 in the case at bar.

Additionally, ten years later in *Witte v. United States*, 515 U.S. ___, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995), this Court considered at length the issue of whether subsequent prosecution for conduct considered at a sentencing on a different charge was inappropriate and violative of the Double Jeopardy Clause of the Fifth Amendment. Specifically, this Court noted at p. 2205:

> "Against this background of sentencing history, we specifically have rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime."

This holding was joined in by every member of the Court except Justice Stevens. (See J. Stevens at 2210 et seq.)

In fact, two justices, Scalia and Thomas, would specifically only use double jeopardy principles where successive *prosecutions* were involved, not merely successive punishment alleged but not found in *Witte*. (See J. Scalia joined by J. Thomas at 2209-2210.)

The reasoning in *McClendon* and *Witte* is not inconsistent with the holding of *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989) wherein it was stated at pp. 448-449:

> "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution."

(Emphasis mine).

It is clear that a majority of the Washington State Supreme Court in the case at bar clearly found the former statutes challenged by Petitioners to be remedial in purpose and effect. *McClendon* at 863-864.[3]

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[3] Even J. Alexander, concurring in dissent and speaking for J. Johnson and J. Madsen, disagrees with J. Sanders' dissent suggesting if a sanction is partially remedial and partially punitive, it always violates the Double Jeopardy Clause of the United States Constitution. *McClendon* at 876-877. Respondent State of Washington suggests their real problem with the "legislative scheme" relates to the future enhancement penalty based upon purely administrative action may have been a due process, *not* double jeopardy, problem. This issue was not raised in the Washington Supreme Court or this court. See J. Talmadge, concurring, footnote 58 at 874.

There is no significant basis to conclude that the issuance of the probationary licenses under the former Washington statutes in any way violated the Double Jeopardy Clause of the United States Constitution, even prior to the *Ursery* decision.

B. *United States v. Ursery.*

Petitioners contend on pages 8 and 9 of their Petition that *Ursery* is largely irrelevant to the discussion involved.

Significantly, *Ursery* clearly reiterated *Halper's* narrow scope and how the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) and the Ninth Circuit in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) had misread not only *Halper* but *Austin* [*Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993)] and *Kurth Ranch* [*Montana v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994)]. Rehnquist, C.J. in *Ursery* at 564.

Petitioners attempt to "bootstrap" review by attempting to tie into this Court's in rem versus in personan distinction as to *forfeitures*. Do Petitioners suggest that immediate forfeiture of a state-issued license is a lesser "penalty" than the inchoate possibility of enhanced jail time after a second arrest and conviction for DUI? This would be an analomous and weak argument at best. Several State courts have allowed such an administrative action without finding double jeopardy. See *Tench v. Com.*, 21 Va. App. 200, 462 S.E.2d 922, 923-24 (Va. App. 1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630, 42 Cal. Rptr. 422, 427-28, ___ P.2d ___ (Cal. App. 1

Dist. 1995); *State v. Zimmerman*, 539 N.W.2d 49, 52-56 (N.D. 1995); *State v. Higa*, 79 Haw. 1, 897 P.2d 928, 933-34 (1995); *State v. Savard*, 659 A.2d 1265, 1267-68 (Me. 1995); *State v. Talavera*, 127 Idaho 700, 905 P.2d 633 (1995); *State v. Mertz*, 258 Kan. 745, 907 P.2d 847 (1995).

It is important to note, as Petitioners state, that both opinions of concurring Justice Talmadge and of Justice Alexander who concurred in the dissent of Justice Sanders, found *Ursery* to be significant and to somewhat diminish Petitioners' argument. See at *McClendon* at 870, footnote 55 and *McClendon* at 876.

C. The issuance of the probationary license under Washington's former statutes to Petitioners does not constitute punishment as that term is considered under federal or state interpretation of the Double Jeopardy Clause of the United States Constitution.

Petitioners believe that the mere issuance of a probationary license, with no further action on the part of the Washington Department of License, constitutes punishment thus implicating double jeopardy concerns. Respondent contends that this is not only inconsistent with the Washington Supreme Court in *McClendon* but inconsistent with harsher situations to drivers such as administrative license revocations involving DUI convictions in separate proceedings in several jurisdictions. Many of these instances are cited by Justice Talmadge in his detailed concurring opinion at pages 869-874 of *McClendon*.

Additionally, as Justice Talmadge succinctly points out in footnote 55 at page 870 in taking issue with Justice Sanders' dissent:

> The dissent (J. Sanders) relies on our language in *State v. Clark*, 124 Wn.2d 90, 98, 875 P.2d 613 (1994): "[A] forfeiture statute must be solely remedial to escape characterization as 'punishment' under the federal double jeopardy clause." *Clark*, in turn, relied on *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) for the same wording. *Clark*, 124 Wn.2d at 100. Leaving aside the important question of whether the same considerations that apply in the civil forfeiture arena in the context of driver license administration, the Supreme Court has decided that "the holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence." *United States v. Ursery*, ___ U.S. ___, 116 S. Ct. 2135, 2147, 135 L. Ed. 2d 549 (1996). The dissent evidently believes the Supreme Court is wrong about this and relies heavily on *Austin* for its double jeopardy analysis. We are bound to observe the Supremacy Clause: the Supreme Court's rulings on double jeopardy under the federal constitution control. We have said our state constitution provides no greater double jeopardy protection than the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995).

Further, Justice Talmadge goes on to conclude in a stinging footnote which aptly appears consistent with not only the plurality in *McClendon* but with *Ursery* in footnote 59, page 875:

> The dissent's (J. Sanders) conclusion that the issuance of a probationary license is punishment is strange. As a consequence of the issuance of the probationary license in this case, precisely nothing happened to the respondents. (The Petitioners in this case). They were not deprived of life, limb, liberty or property. Nor was there any effect whatsoever on their privilege to drive in Washington. In fact, even though their BAC Datamaster test indicated they were driving with more than the legal limit of alcohol in their systems, they have not been tried for drunk driving because the court below dismissed the charges against them. *The respondents have not been punished.* "The risk to which the Double Jeopardy Clause refers is not present in proceedings that are not 'essentially criminal.' " *Breed v. Jones,* 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). It is only upon the contingency of a *future* charge for DUI that the effect of the probationary license springs to life. I *cannot comprehend how the [Double Jeopardy] Clause can apply to something that has not yet happened, and may never happen, to require dismissal of the DUI charges in this case.*

(Emphasis mine)

III. CONCLUSION

Petitioners have cleverly attempted to convince this Court to take this case based on the grounds that the mere issuance of the probationary drivers license constitutes punishment thus violating the federal Double Jeopardy Clause, although no criminal conviction has been

had in any case at bar nor would any enhanced punishment exist unless and until a second, subsequent, DUI conviction against any of these defendants occurs within five (5) years.

This is, as the concurring opinion by Justice Talmadge, notes, *strange* to say the least. Petitioners have not been punished and the Double Jeopardy Clause is not, therefore, implicated.

Significantly, only dissenting Justice Sanders seems to accept Petitioners' requested conclusion in *McClendon*.

Further, this Court is well aware of historical roots of numerous state licensing actions as being independent and separate of court proceedings and remedial in effect. Washington is no different in that regard, and has not been different in that regard at least since the Washington Supreme Court decided *State v. Scheffel*, 82 Wn.2d 872, 514 P.2d 1052 (1973), *appeal dismissed*, 416 U.S. 9654 (1974).[4]

Confusion in lower Courts – such as the Whitman County District Court and various other courts in the United States like the Sixth and Ninth Circuits prior to this Court's *Ursery* opinion – occurred because these lower courts have failed to follow this Court's caveat that double jeopardy is only triggered "in the rare case." *Halper* at 449. Specifically, Respondent respectfully submits that those lower courts and Justice Sanders in his

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[4] If anything, these probationary licenses were far less restrictive than states where administrative license suspension and revocation occur under similar circumstances in separate proceedings. (See *McClendon* at 870-75, J. Talmadge, concurring; See, also, J. Stevens, dissenting in *Ursery* at 2161, footnote 23.)

dissent have failed, fundamentally, to follow the very specific warning Justice Kennedy pronounced in *Halper* when he stated in his concurring opinion at page 453:

> "Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. (Citations omitted). Such an inquiry would be amorphous and speculative and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands."

Respondent respectfully submits that this court deny Petitioners' requested Writ of Certiorari and leave standing the opinion of Washington State's highest court.

Respectfully submitted,

JAMES H. KAUFMAN
Whitman County
Prosecuting Attorney
Attorney for Respondent
WSBA #07836

APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON, Appellant, vs. DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEPHEN STARK, BRIAN HAYTON, MARK BOOTH, Respondents.	NOS. 95-1003D, 94-1638D, 95-1066D, 95-1053Y, 95-1021D, 95-1122D, 95-1162D, 95-1165D 95-1-00040-4 AGREED NARRATIVE OF REPORT OF PROCEEDINGS

Doy L. McClendon, Gil Crosby, Sally Parrish, Frank Sayre, Richard Triquart, Stephen Start, Brian Hayton and Mark Booth were arrested for suspicion of violating RCW 46.61.502 on 12/9/94, 11/19/94, 12/2/94, 1/31/95, 12/18/94, 2/3/95, 2/9/95, and 3/5/95 respectfully. Each defendant submitted to a BAC Datamaster Verifier test in compliance with RCW 46.20.308 and all relevant Washington Administrative Code provisions. Each defendant registered a breath test result of .10 or higher. All defendants were issued temporary licenses and advised of their right to an administrative hearing pursuant to 46.20.365. And, all defendants were issued probationary licenses as a result of their performances on the breath test.

Subsequent to the issuance of the probationary licenses the Whitman County prosecutor's office initiated criminal actions in the Whitman County District Court for alleged violations of RCW 46.61.502 the same conduct. On February 16, 1995, Defense's Motion to Dismiss for Violation of Double Jeopardy was filed. On February 21, 1995 the State's response was filed. Argument on this issue was heard by Judge Frazier on March 3 and March 8, 1995. Judge Frazier reserved ruling on the matter. On April 17, 1995, Judge Frazier ruled in favor of the State finding that subjecting a defendant to a civil proceeding which seeks imposition of a probationary driver's license did not constitute punishment. On April 18, 1995, defense counsel filed Defendant's Motion for Reconsideration. On April 27, 1995, Judge Frazier reversed his decision of April 17, 1995, ruling in favor of the defense and citing *State v. Calle*, 125 Wn.2d 769 (1995), but reserving ruling on the appropriate remedy. On May 1, 1995, over the objections of the State, on the ground of lack of notice, the above-entitled cases were consolidated and Findings of Fact and Conclusions of Law were entered granting the defense Motions to Dismiss. On May 9, 1995, the State filed a timely Notice of Appeal.

DATED this 16th day of June, 1995.

/s/ David Frazier
Judge David Frazier

Presented by:

JAMES H. KAUFMAN
Whitman County Prosecuting Attorney

By: /s/ Paul J. Szott
PAUL J. SZOTT
Deputy Prosecuting Attorney
WSBA No. 20862

Agree as to form and content:

By: /s/ Tim Esser
Tim Esser
Nuxoll, Libey, Ensley & Esser
Attorney for Respondents
WSBA No.

By: /s/ Michael Pettit by Tim Esser
Michael Pettit
Wiley, Pettit & Snyder
Attorney for Respondents
WSBA No.

(3)

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No. 97-166

In The

Supreme Court of the United States

October Term, 1997

DOY LEE McCLENDON, GIL CROSBY, SALLY PARRISH, FRANK SAYRE, RICHARD TRIQUART, STEVEN McMILLAN and PAUL AHMANN,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PETITIONERS' REPLY BRIEF

TIMOTHY H. ESSER
Counsel of Record
NUXOLL, LIBEY, ENSLEY, ESSER & CAMPBELL
520 East Main Street
Pullman, WA 99163
(509) 332-7692
(509) 334-2205 [fax]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY BRIEF

Respondent cites with approval Justice Kennedy's concurring opinion in *United States v. Halper*, 490 U.S. 435, 104, L.Ed.2d 487, 109 S.Ct. 1982 (1989), wherein Justice Kennedy states at page 453:

> It [today's holding] does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding.

This language contrasts with the majority's holding in the present case, *State v. McClendon*, wherein the court interprets *Halper* thusly:

> Under *Halper*, the purposes actually served by the sanction at issue must be assessed in determining whether a civil sanction is "punishment" under double jeopardy analysis. *State v. McClendon*, 132 Wn.2d 853, 935 P.2d 1334 (1997), (appendix page 17 Petition for Writ of Certiorari)

In *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2125, 135 L.Ed.2d 549 (1996), the court described the *Halper* analysis as a balancing test, but nevertheless adopted a bright line rule for civil forfeitures stating at page 2145:

> Quite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture . . .

Thus, the result in *Ursery* is consistent with the "objective rule" analysis stressed by Justice Kennedy in his concurring opinion in *Halper*.

Review of *State v. McClendon*, 132 Wn.2d 853, 935 P.2d 1334 (1997) should be granted to consider whether another bright line rule should be applied, instead of the balancing approach suggested by *Halper* and followed by the Washington Supreme Court. We submit that when a civil sanction results in enhanced mandatory jail, the nature of said sanction is so clearly punitive that it should be considered punishment regardless of the fact that other aspects of the sanction or other sanctions imposed in the civil proceeding might be considered remedial.

We (Petitioners) rely on *Ball v. United States*, 470 U.S. 856, 84 L.Ed.2d 740, 53 USLW 4395 (1985), for the proposition that a conviction, even if its sentence is ordered to run concurrent with another conviction, nevertheless constitutes punishment as it may:

> Result in an increased sentence under a recidivist statute for a future offense. *Ball* at 864.

It is precisely this point that the majority of the Washington State Supreme Court in this case ignores.

The Respondent State of Washington in its opposition brief cites with approval the following quote from the concurring opinion filed by Judge Talmadge:

> I cannot comprehend how the [Double Jeopardy] Clause can apply to something that has not yet happened, and may never happen, to require dismissal of the DUI charges in this case. *State v. McClendon*, 132 Wn.2d 853, 935 P.2d 1334 (1997) (Appendix page 28 Petition for Writ of Certiorari)

The Respondent then argues that the more recent U.S. Supreme Court case of *Witte v. United States*, 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), somehow distinguishes the holding of *Ball*. A careful reading of *Witte* suggests that it is consistent with *Ball* and when applied to the present facts would result in the administrative imposition of a probationary license being found as punishment as it acts as the equivalent of a criminal conviction for sentencing enhancement purposes. The U.S. Supreme Court in *Witte* answers Judge Talmadge's concern at page 397:

> This claim is ripe at this stage of the prosecution – although petitioner has not yet been convicted of the cocaine offenses – because, as we have said, "courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v. Ohio*, 432 U.S. 151, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). See also *Ball v. United States*, 470 U.S. 856, 861, 864-865, 105 S.Ct. 1668, 1671, 1673-1674, 84 L.Ed.2d 740, (1985) (explaining that, for purposes of the double jeopardy inquiry, punishment "must be the equivalent of a criminal conviction and not simply the imposition of sentence); . . .

The court in *Witte*, however, holds that the consideration by the sentencing court of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range does not constitute punishment for that conduct, *Witte*, page 397. Here, should the Petitioners be prosecuted for DUI out of a new incident, and convicted, the court at that sentencing will necessarily

impose an enhanced jail sentence because of the administrative finding in this case – even if Petitioners are acquitted of the pending DUI charge. As Justice Stevens notes in his *Witte* dissent at page 413:

> In *United States v. Halper,* and *Montana v. Kurth Ranch* (citations omitted) we emphatically rejected the proposition that punishment under the Double Jeopardy Clause only occurs when a court imposes a sentence for an offense that is proven beyond a reasonable doubt at a criminal trial.

That statement is accurate and seems at odds with the following dicta from the *Witte* majority decision at page 400:

> In addition, by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in "punishment" for such conduct.

Respondent might cite this latter statement for support on the merits. But for purposes of this Petition and the issue of why the U.S. Supreme Court should grant certiorari, we respectfully suggest there is a need to clarify the appropriate analysis to apply when the State seeks an administrative civil sanction which acts as the equivalent of a criminal conviction and simultaneously proceeds with an independent criminal prosecution.

The U.S. Supreme Court in *Ursery,* has adopted a bright line rule in the circumstance of civil forfeiture. In view of the evolution of double jeopardy law since *Ball,* specifically that civilly imposed sanctions may implicate

double jeopardy punishment protections, another bright line rule should be applied rather than the *Halper* majority's balancing analysis. Specifically, where the civil sanction is the equivalent of a criminal conviction for jail enhancement purposes, it should be considered punishment.

DATED: This 18th day of November, 1997.

Respectfully submitted,

NUXOLL, LIBEY, ENSLEY,
ESSER & CAMPBELL

TIMOTHY ESSER
Attorneys for Petitioners